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IN THE

Supreme Court of the United States

October Term, 1964
No. 722

SCHWARTZ-TORRANCE INVESTMENT CORPORATION,
Petitioner,

vs.

BAKERY & CONFECTIONERY WORKERS UNION, LOCAL No. 31,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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vs.

BAKERY & CONFECTIONERY WORKERS UNION, LOCAL No. 31,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Schwartz-Torrance Investment Corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above-entitled case on August 31, 1964.

Citations to the Opinions Below.

The opinion of the trial court, the Superior Court of the State of California for the County of Los Angeles, is unreported and is printed in Appendix B hereto, *infra*, p. 2[illegible]. The opinion of the intermediate appellate court, the District Court of Appeal of the State of California, printed in Appendix B hereto, *infra*, p. 15, is reported in 222 A. C. A. 378. The opinion of the Supreme Court of the State of California, printed in Appendix B hereto, *infra*, p. 5, is reported in 61 A. C. 832.

Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on August 31, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

The constitutional question (whether picketing on shopping center property is protected free speech) was the central issue in all proceedings below:

Superior Court. Respondent initially raised the constitutional question in the joint pre-trial statement (which supercedes the pleadings under California practice). Respondent's contention No. 8 in the joint pre-trial statement reads: "That Defendant Union and its pickets have a legal and constitutional right to picket on the premises of the shopping center." [R. 27.]

District Court of Appeal. Respondent's opening brief specifies issue No. 1 to be:

> "Is Appellant, in exercise of its constitutional right of free speech, entitled to use the premises of Respondent's shopping center in order to conduct organizational picketing and to advertise a labor dispute with one of the Respondent's tenants, despite the Respondent's claim of trespass?" [R. 108.]

The opinion of the District Court of Appeal reached that constitutional question, viewing the matter as a ". . . conflict between property rights and freedom of speech". (Appendix B, *infra,* p. 26.)

The Supreme Court of the State of California. The opinion of the Supreme Court of the State of California was wholly concerned with the constitutional question:

> "The problem presented in this case is one of accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection." (Appendix B, *infra,* p. 6.)

The Court went on to say: "The picketing indeed, involves an exercise of the constitutionally protected right of freedom of speech." (Appendix B, *infra,* p. 8). Pursuant to this opinion, the judgment of the Supreme Court of the State of California reversed the judgment of the trial court which had enjoined picketing on shopping center property. The court, in effect, held that there was a constitutionally protected right to picket on shopping center property.

Question Presented.

Whether organizational picketing by a labor union on the property of a shopping center is constitutionally protected free speech which can not be enjoined as trespass at the instance of the property owner?

Constitutional Provisions Involved.

The constitutional provisions involved are the 1st and 14th Amendments to the Constitution of the United States. They are printed in Appendix A, *infra,* p. 1.

Statement.

Petitioner owns and operates a small, six-acre shopping center in Torrance, California. One of its tenants is a bakery which has four or five employees. Respondent Union sought unsuccessfully to organize the bakery employees. For that purpose, Respondent conducted organizational picketing in from of the bakery on the walkways belonging to Petitioner shopping center. Respondent Union had no quarrel with Petitioner shopping center. After the picketing commenced, Petitioner brought an action in trespass and the Superior Court enjoined the picketing on shopping center property. The trial court found that Petitioner had retained exclusive control of the parking lot and walk-ways in the shopping center and that they were constructed and maintained solely for the convenience of customers. [R. 29.] The District Court of Appeal reversed the judgment of the trial court, principally on the authority of *Marsh v. Alabama*, 326 U. S. 501. The Supreme Court of the State of California (vacating the opinion of the District Court of Appeal) also reversed the judgment of the trial court, holding that picketing on shopping center property is constitutionally protected free speech which may not be enjoined as trespass.

Reasons for Granting the Writ.

1. The California Court has decided a Federal Constitutional question of substantial importance not heretofore determined by this Court. In many recent cases, even under the impetus of the mounting pressures for the protection of civil rights, this Court has carefully refused to say that restaurants, department stores, and other similar "private facilities" are subject to the

Fourteenth Amendment limitations. See, for example, *Peterson v. City of Greenville,* 373 U. S. 244; *Lombard v. Louisiana,* 373 U. S. 267; *Griffin v. Maryland,* 378 U. S. 130, and companion cases. These cases involved private facilities which are wholly analogous to shopping centers in the invitation they extend to the general public. Further, in the almost 20 years since the decision in *Marsh v. Alabama,* 326 U. S. 501, upon which the shopping center cases almost wholly rely, this Court has refused to enlarge that holding. Except for racial discrimination cases, this Court has refused to expand the doctrine of State Action to bring otherwise ostensibly private affairs, involving "invitations to the public", within the purview of the Fourteenth Amendment. What this Court has carefully avoided, the California Court has done at a single step.

2. The California Court has decided a Federal Constitutional question of substantial importance in a way probably not in accord with the decisions of this Court. The conduct here, which the California Court accorded the protection of free speech, was picketing pure and simple. This Court has made clear "that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all state regulation." *Teamsters Local 695 v. Vogt, Inc.,* 354 U. S. 284, at 289 (peaceful organizational picketing). Indeed, in a whole series of cases culminating in *Vogt,* this Court has held picketing to lie outside the protective coverage of free speech. *Teamsters v. Hanke,* 339 U. S. 470; *Hughes v. Superior Court,* 339 U. S. 460; *Giboney v. Empire Storage and Ice Co.,* 336 U. S. 490; *Building Service Employees v. Gazzam,* 339 U. S. 532; *Pappas v. Stacey,* 350 U. S. 870; *Plumbers Union v.*

Graham, 345 U. S. 192. Also, this Court in construing the Taft Act, albeit not the Constitution, has ruled that the NLRB is powerless to open the property of employers to trespass by non-employee union organizers. *NLRB v. Babcock & Wilcox,* 351 U. S. 105. Here, the California court has relied on a too literal reading of *Thornhill v. Alabama,* 310 U. S. 88. The California court failed to consider the limitations on picketing and failed to consider the above cases which qualified *Thornhill.* The California court has written "picketing" into the Constitution, contrary to the teaching of *Vogt* and other cases.

3. The question has substantial importance. It is desirable that this Court clarify the application of *Marsh* to property such as shopping centers, especially because the various state court decisions are in basic disagreement. The Supreme Court of Michigan divided evenly, thereby affirming a lower court decree enjoining interference with handbilling on shopping center property. *Amalgamated Clothing Workers v. Wonderland Shopping Center,* 370 Mich. 547, 53 LRRM 2950. The Supreme Court of Washington divided five to four, the majority holding that state jurisdiction was pre-empted by the NLRB while four justices would have permitted picketing under *Marsh. Freeman v. Retail Clerks,* 58 Wash. 2d 426, 48 LRRM 2835. Also, the Supreme Court of Wisconsin indicated it would permit picketing under *Marsh,* although deciding the case on other grounds (affirming the denial of a motion for summary judgment where a shopping center sought an injunction against trespass). *Moreland Corp. v. Retail Stores Employees Union,* 144 N.W. 2d 876, 50 LRRM 2092. An opposite position was taken by the Supreme Court of

Illinois in upholding a criminal trespass conviction for picketing on a Sears parking lot. *People v. Goduto,* 21 Ill. 2d 605, 45 LRRM 2126, cert. den. 368 U. S. 927. Likewise, the Tennessee Supreme Court affirmed a trespass conviction for picketing on the parking lot of food stores. *Hood v. Stafford,* .... Tenn. ...., 56 LRRM 2340. It need hardly be emphasized that shopping centers, of an infinite variety, are being established at a great rate throughout the country and play an important part in the economic life of many communities.

The question also has importance because the decision, if allowed to stand, would remove the matter of the wisdom and regulation of such picketing from any consideration by the state legislatures. By giving such picketing the dignity and status of a constitutionally protected right, the decision would preclude future legislative regulatory action.

Perhaps nothing demonstrates more clearly the importance of the question than the care exercised by this Court in its consideration of cases which would expand the concept of State action. To make "private" property subject to the same limitations as "public" property is no small matter, as this Court has recognized. It is a drastic step to open "private" property to all manner of political, religious, social and business groups parading under the guise of free speech.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FREDERICK A. MORGAN,
Counsel for Petitioner.

APPENDIX A.

First and Fourteenth Amendments to the Constitution of the United States.

AMENDMENT I

Restrictions on Powers of Congress

[Section 1*.] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Proposed September 25, 1789; ratified December 15, 1791.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt.

Citizenship

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Words in brackets added.

Apportionment of Representatives

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Disqualification for Public Office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Public Debt, Guarantee of

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Power of Congress

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proposed June 13, 1866; ratified July 9, 1868; certified July 28, 1868.

APPENDIX B.

Judgment.

In the Supreme Court of the State of California.

Schwartz-Torrance Investment Corporation, Plaintiff and Respondent, vs. Bakery and Confectionery Workers' Union, Local No. 31, Defendant and Appellant. L.A. No. 27282.

Filed Oct. 5, 1964.

Appeal County of Los Angeles, Superior Court No. 791071.

The above entitled cause having been heretofore fully argued, and submitted,

It Is Ordered, Adjudged, and Decreed by the Court that the judgment of the Superior Court County of Los Angeles in the above entitled cause, is hereby reversed.

Appellant to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 31st day of August, 1964,

Witness my hand and the seal of the Court, this 1st day of October, 1964,

William I. Sullivan
Clerk
By G. E. Bishel
Deputy

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California in Bank.

Schwartz-Torrance Investment Corporation, Plaintiff and Respondent, vs. Bakery and Confectionery Workers' Union, Local No. 31, Defendant and Appellant. L.A. 27282.

Filed Aug. 31, 1964.

This case requires a decision upon the sole issue of whether the owner of a shopping center may enjoin as trespass a union's peaceful picketing of premises leased by an employer from the owner of the shopping center. As we shall explain, we have concluded that such owner is not entitled to enjoin the union from so picketing.

Plaintiff owns and operates a shopping center located on a six-acre parcel of land leased from the City of Torrance. The shopping center consists of a parking lot, driveways, sidewalks, and several stores. Plaintiff subleases the stores to various tenants, but retains exclusive control over the parking lot and sidewalks, including those sidewalks adjacent to the subleased stores. Tom Revels, the owner of Tom Revels Bakery, leases a store in plaintiff's shopping center for a monthly rental of $450 plus five per cent of the gross income of the bakery.

Defendant union sought unsuccessfully to organize the four or five employees of the Tom Revels Bakery and towards that end began on February 16, 1962, to engage in picketing in front of the bakery on the sidewalks belonging to the plaintiff. The pickets carried

signs stating that, "Revels Bakery is nonunion and is unfair to organized labor. Please do not patronize. Bakers Union Local 31."

Plaintiff initiated this action to enjoin defendant from trespassing on plaintiff's property. After trial the superior court entered judgment enjoining defendant and its members from entering plaintiff's property for the purpose of picketing. Defendant appeals from that judgment.

The problem presented in this case is one of accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection. Resolution turns upon a balancing of the union's interest in such peaceful picketing for a lawful purpose[1] against the plaintiff's interest in the possession and enjoyment of his property in these special circumstances.

We turn first to an analysis of the interests of the union. Picketing by a labor union constitutes an integral component of the process of collective bargaining; as such it involves the exercise of a right which is both statutorily and constitutionally sanctioned.

The Legislature has expressly declared that the public policy of California favors concerted activities of employees for the purpose of collective bargaining or other

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[1]Plaintiff does not, nor could it, contend that the purpose of the picketing in the instant case was unlawful. (See Metropolitan Market Co. v. Lyons (1940) 16 Cal. 2d 389; Pezold v. Amalgamated Meat Cutters (1942) 54 Cal. App. 2d 120; Senn v. Tile Layers (1936) 301 U. S. 468.)

mutual aid or protection. (Lab. Code, § 923; see Messner v. Journeymen Barbers etc. International Union (1960) 53 Cal.2d 873, 882; Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379, 385; Nahas v. Local 905, Retail Clerks Assn. (1956) 144 Cal.App.2d 808, 813.) Moreover, the Legislature has enacted this policy into an exception to the criminal trespass law. (Pen. Code, § 552.1) Thus recently we reversed the conviction of a labor union official for picketing on the property of a nonparticipant in the labor dispute. Construing section 552.1, which excepts from the criminal trespass statute any "lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union . . ." we concluded that ". . . the Legislature in dealing with trespasses . . . has specifically subordinated the rights of the property owner to those of persons in lawful labor activities." (In re Zerbe (1964) 60 Cal.2d 666, 668.) The policy of the state as expressed in the Labor Code accords with that embodied in federal legislation.[2]

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[2]In Messner v. Journeymen Barbers Etc. International Union, supra, 53 Cal.2d 873, 883, we stated: "This court's interpretation of section 923 of the Labor Code (*Shafer v. Registered Pharmacists Union, supra*) is in accord with the United States Supreme Court's interpretation of a similar provision of the Taft-Hartley Act. (§ 7, 29 U.S.C. § 157.) Pointing out that '[b]asic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection' the United States Supreme Court, after a review of the legislative materials, held that peaceful picketing for recognition by a union that does not represent a majority of the employees is not an unfair labor practice under § 8(b)(1)(A). (*N.L.R.B. v. Drivers' Local 639*, 362 U.S. 274 [80 S.Ct. 706, 4 L.Ed.2d 710]; 28 U.S.L. Week 4217, 4219, 4222, March 28, 1960.) The court's opinion makes plain that the Labor-Management Reporting and Disclosure Act of 1959 does not . . . relegate this litigation to the status of an unimportant controversy over the meaning of a statute which has been significantly changed.' (*Id.* at 4218.)"

The picketing, indeed, involves an exercise of the constitutionally protected right of freedom of speech. In Thornhill v. Alabama (1939) 310 U.S. 88, 102, the United States Supreme Court, in striking down a blanket ban upon all picketing, declared that ". . . the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

Although the court subsequently qualified its broad ruling in *Thornhill* by adopting a test permitting states to enjoin peaceful picketing for a purpose antithetical to some valid state policy,[3] the bedrock principle of *Thornhill*, that picketing constitutes a manifestation of free speech, remains intact.[4] This court has frequently acknowledged and applied the *Thornhill* principle. Thus in Hughes v. Superior Court (1948) 32 Cal.2d 850, 854, we said that "it is now established as the law that 'the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech.' " (See McKay v. Retail Auto S.L. Union 1067 (1942) 20 Cal.2d 311, 319; Magill Bros. v. Bldg. Service etc.

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[3]See, e.g., Teamsters Local 695 v. Vogt (1957) 354 U.S. 284; Giboney v. Empire Storage & Ice Co. (1949) 336 U.S. 490. Justice Frankfurter, writing in *Vogt*, summarized this modification of *Thornhill* as follows: "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation." (*Id.* at p. 291.)

[4]See Chauffers Local 795 v. Newell (1957) 356 U.S. 341; Cafeteria Employees Union v. Angelos (1943) 320 U.S. 293; Bakery & Pastry Drivers Local 802 v. Wohl (1942) 315 U.S. 769; American Federation of Labor v. Swing (1940) 312 U.S. 321; see generally Note (1958) 11 Vand.L.Rev. 627.

Union (1942) 20 Cal.2d 506, 511-512; Rees v. City of Palm Springs (1961) 188 Cal.App.2d 339, 346.)

Nor is the union's interest in picketing diminished because it may communicate its message at other, admittedly less advantageous, locations off plaintiff's premises. As we said in Wollam v. City of Palm Springs (1963) 59 Cal.2d 276, 284, "... freedom of speech entails communication; it contemplates effective communication." (Cf. Schneider v. Irvington (1939) 308 U.S. 147, 163.) The evidence further discloses that in the instant case picketing on other nearby public streets or sidewalks would entail the danger of traffic tie-ups, confusion as to the object of the picketing, and the requirements of larger signs and more pickets.

On the other hand, the countervailing interest which plaintiff endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of plaintiff's interest must be largely theoretical. Plaintiff has fully opened property to the public. Approximately 10,000 people visit the premises weekly. The shopping center affords unrestricted access between its parking lot and the public streets. The center constitutes a conglomeration of business enterprises designed to provide essential services to all members of the local community; "access by the public is the very reason for its existence." (Lombard v. U. S. (1963) .... U. S. ....., 10 L.Ed. 338 (concurring opinion).)

Plaintiff suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public.

As we observed in In re Zerbe (1964) 60 Cal.2d 666, 670, "The infringement of [plaintiff's] property rights was technical rather than substantial." The Supreme Court of the United States in Marsh v. Alabama (1946) 326 U.S. 501, describes the diluted nature of a property right in premises opened to the public. In upsetting the conviction of a defendant who had distributed religious literature on the sidewalks of a company town, that court said, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Id.* at p. 506.)[5]

We conclude that the defendant's interest in picketing outweighs plaintiff's interest in vindicating a theoretical invasion of its right to exclusive control and possession of private property.

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[5]Justice Cardozo has eloquently developed the thesis that "property rights" no longer enjoy the characteristic of absolutism formerly accorded them: "Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What the regulation shall be, every generation must work out for itself. The generation which gave us Munn v. Illinois, 94 U.S. 113 (1876), and like cases, asserted the right of regulation whenever business was 'affected with a public use.' . . . Today there is a growing tendency in political and juristic thought to probe the principle more deeply and formulate it more broadly. Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another. That is the dominant theme of a new and forceful school of publicists and jurists on the continent of Europe, in England, and even here." (Cardozo, The Nature of the Judicial Process, 87-88.) For a discussion of the public interest concept, see Tunkl v. Regents of University of California (1963) 60 Cal.2d 92, 98, fn. 9.)

This conclusion accords with the still exiguous body of cases relating to the rights of picketers on the premises of shopping centers. A few states have adjudicated cases substantially similar to the instant one. In Amalgamated Clothing Workers of America v. Wonderland Shopping Center (Mich. 1963) 122 N.W.2d 785, a divided court affirmed the issuance of an injunction to restrain the shopping center from interfering with the union's right to distribute leaflets on the center's property. The court characterized the owner's right as follows: " 'The change from the operation of a single store by a storekeeper to a large, complex, multiple shopping center, alters the very nature of the operation from one of a purely private character to one of public or quasi-public character. The single storekeeper would still be entitled to prevent any unauthorized intrusion on his private property. The defendants, through this large development, in a highly urban area, no longer can claim the same rights to their property. The property of the defendants has lost its identity as private property.' " (*Id.* at p. 794.)

In State v. Williams (Balt.Crim.Ct. Md. 1959) 44 LRRM 2357, the court reversed defendant's conviction of criminal trespass on the premises of a shopping center posted against peddlers, solicitors, and pickets, stating: "By opening it to the public, the owner's property rights have become secondary to broad use by the public, which includes the right of a labor union to engage in peaceful picketing." (*Id.* at p. 2360.) Similarly, in People v. Barisi (N.Y.Mag.Ct. 1948) 23 LRRM 2190, involving picketing against a news company which leased space in the privately-owned Pennsylvania Station, the court concluded that: ". . . by opening up their place to the

general public, the owners of the station have made it a quasi-public place, and as such their ownership is 'circumscribed by the constitutional rights of those who use it.'" (*Id.* at p. 2191; accord Moreland Corp. v. Retail Store Emp. U. Local No. 444 (Wisc. 1962) 114 N.W. 2d 876, 879 (dictum); Freeman v. Retail Clerks Union Local No. 1207 (Wash. 1961) 363 P.2d 803, 806 (concurring opinion).)

In the only federal case directly in point, Marshall Field & Co. v. N.L.R.B. (7th Cir. 1953) 200 F. 2d 375, the court sustained a ruling of the National Labor Relations Board which held invalid a company rule prohibiting nonemployees from soliciting for members on a privately-owned street running between two portions of the employer's large department store. The court stated that the street partakes "of the nature of a city street, even though owned by the company. . . ." (*Id.* at p. 380.)

Although plaintiff admits that the proper resolution of this case must be found in an accommodation of conflicting interests, it contends that precedent from this and other jurisdictions supports its position.

Plaintiff refers first to Nahas v. Local 905, Retail Clerks Assn. (1956) 144 Cal.App.2d 808, the sole California case dealing with the shopping center problem. In *Nahas* the employer-tenant sued to enjoin picketing on the premises of the shopping center. The court held that the plaintiff could not exert a sufficient possessory interest to maintain the trespass action. (*Id.* at p. 818.) Plaintiff, however, finds in the court's opinion an intimation that the shopping center lessor could sue to enjoin the trespass on its property. Any such implication derives only from a strained construc-

tion (cf. p. 819); in any event our ruling here nullifies the effect of any dicta in *Nahas* that the shopping center lessor could bring such an action.[6]

Plaintiff further contends that the weight of authority from other states subordinates the union's interest to the interest of the property owner. Plaintiff cites several cases, none of which support its contention. Stafford v. Hood (Tenn. Ct.App. 1963) 53 LRRM 2771, involved trespass on the parking lot of a grocery store, not a shopping center. In People v. Goduto (Ill. 1961) 174 N.E.2d 385, the court held defendant guilty of criminal trespass on the Sears parking lot solely because the union engaged in picketing for an unlawful purpose. Fleming v. H. W. Ivey Constr. Co. (Ga. 1959) 111 S.E.2d 97, did not involve picketing on the premises of a shopping center; moreover, the picketing resulted in the complete stoppage of work, and the union failed to establish that its picketing had been undertaken for a lawful purpose. Finally, in Spohrer v. Cohen (Sup. Ct. 1956) 149 N.Y.S.2d 493, defendants were punished for contempt of a temporary injunction against engaging in activities which did not contemplate a legitimate labor purpose and which violated a court order. The court expressly found that "nothing in this action . . . for injunction was concerned with labor union activities." (*Id.* at p. 494.)

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[6]In an excellent analysis of the entire problem of peaceful picketing at shopping centers, the note-writer in *Shopping Centers and Labor Relations Law* (1958) 10 Stan. L.Rev. 694, 697, points out, "There is language in the *Nahas* case which suggests that the landlord could prohibit the union activity. In fact, the court's reasoning would compel such a result. Since possession and dominion over the area remained in the landlord, he could maintain a trespass action." The note suggests that such reasoning leads to the result that the success of the suit would depend upon who happened to bring it.

Plaintiff finally contends that N.L.R.B. v. Babcock & Wilcox (1956) 351 U.S. 105, precludes picketing in the present case. In *Babcock & Wilcox* the United States Supreme Court upheld an employer's right to prohibit nonemployees from distributing union literature on the company parking lot. Unlike the plaintiff's property in the present case, the Babcock & Wilcox parking lot was not generally open to the public.

We conclude that the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.

in light of this conclusion we need not consider defendant's contention that jurisdiction to intervene in this dispute resides exclusively in the National Labor Relations Board. (See In re Zerbe (1964) 60 Cal.2d 666, 670.)

The judgment is reversed.

Tobriner, *J.*

We Concur:

Gibson, *C. J.*
Traynor, *J.*
Schauer, *J.*
McComb, *J.*
Peters, *J.*
Peek, *J.*

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Schwartz-Torrance Investment Corporation, a corporation, Plaintiff and Respondent, vs. Bakery and Confectionery Workers' Union, Local No. 31, an unincorporated voluntary association, Defendant and Appellant. 2 Civ. 27253.

Filed Nov. 18, 1963.

Appeal from a judgment of the Superior Court of Los Angeles County. Prentiss Moore, Judge.

For Appellant: Brundage, Hackler & Roseman, by Eugene Miller, and Julius Reich.

Brief for California State Council of Retail Clerks, Amicus Curiae in Behalf of Appellant: Carroll, Davis, Burdick & McDonough, Roland C. Davis.

Brief of Amicus Curiae in Support of Appellant: Lionel Richman, A. L. Wirin, Fred Okrand.

For Respondent: McLaughlin & McLaughlin, Joseph A. McLaughlin, Jr., Frederick A. Morgan,

Brief for California Retailers Association Amicus Curiae in Behalf of Respondent: Angell, Adams, Gochnauer, Elder & Holmes, by Pembroke Gochnauer.

This action was brought by the owner of a shopping center (not a party to a labor dispute) to enjoin as trespass a Union's peaceful organizational picketing being conducted (on the sidewalk immediately in front of the business or store of a tenant sought to be organized) within the shopping center.

The appeal is by defendant Union from the judgment in favor of plaintiff owner which permanently enjoins

and restrains defendant (1) from trespassing or entering upon plaintiff's shopping center for the purpose of conducting any picketing activities thereon directed at plaintiff's tenant, Tom Revels, or interfering or attempting to interfere with the customers or potential customers of plaintiff while any such customers or potential customers are on the said property or any part thereof; (2) while on such property from carrying any placards and from distributing any handbills or other written matter relating or pertaining to any tenant on the said property or from causing or soliciting in any way, either orally or in writing, or by threat or any other device, any customers or prospective customers to refrain from entering upon the said property or doing business with any of the tenants of plaintiff located on the said property; and (3) while on the property from harassing, annoying or intimidating any customers or prospective customers of any tenants on the said property, either by word of mouth, sign or other activity or by the use of any threats or coercive tactics of any kind or nature whatsoever.

A résumé of some of the significant events is as follows: On June 11, 1962, plaintiff filed a second amended complaint to enjoin trespassing and picketing activities on plaintiff's property. It was alleged therein in substance that plaintiff is now and has been at all times mentioned the lessee under a valid and subsisting written lease of a parcel of real property located in the City of Torrance; that the terms of the lease began on March 1, 1958, and ends on December 31, 2007 A.D.; that plaintiff's lessor is the City of Torrance; that after the execution of the lease plaintiff constructed a shopping center known as Rolling Hills Plaza consisting of

stores, parking lot, driveway and walkway; that among the said stores are the following: a retail food market, a bakery shop, a drugstore, a barber shop and a cleaning establishment; that plaintiff subleases and rents the stores to various tenants. In front of each of the stores is a walkway which is located on plaintiff's premises. "That the purpose of said walkway is to provide a means of ingress and egress to the stores located in said shopping center, and was built and is maintained by plaintiff solely for the use of plaintiff's tenants and the customers and suppliers of said tenants. That directly next to the walkway is a vehicle parking lot which is adjacent to Highway 101 and Crenshaw Boulevard. That under the terms of the said written lease, plaintiff is in exclusive possession and control of said walkway and parking lot, and plaintiff operates and maintains the parking lot and walkway for the sole convenience of plaintiff's tenants and the customers and suppliers of said tenants," that the bakery shop is subleased and rented to one Tom Revels and is known as Revels' Bakery Shop. Under the terms of the lease Revels is required to pay plaintiff as rental the sum of $450 per month plus an additional percentage rental of 5 per cent of the gross income of the operation of Revels' Bakery Shop. Plaintiff further alleged that on or about February 16, 1962, defendant Union caused pickets to be placed on the walkway directly in front of Revels' Bakery Shop, that the picketing took place each and every day from February 16th until on or about the 7th day of March 1962. Plaintiff asserted that while defendant's pickets were picketing and trespassing on plaintiff's property, the pickets among other things informed customers that the bakery shop was full of

cockroaches, they made faces at the customers, performed obscene actions, making obscene gestures to female customers and performed a number of other activities. Further that the defendant resumed trespassing and picketing on April 17, 1962, and since that date defendant has been intimidating the customers of Revels' Bakery Shop by writing down the license numbers of all customers who patronize the shop and using vile and filthy language to customers of the bakery shop.

Plaintiff then asserted that it "has no employees who are members of the defendant union or who are represented by the defendant union in any way, and there is no controversy between defendants and Revels Bakery Shop concerning any matter whatsoever, except that defendants are seeking by the said picketing and acts hereinabove described to force Tom Revels to recognize the defendant union as the bargaining agent and representative of and for Tom Revels' employees. That plaintiff has nothing to do with the employment of employees of Tom Revels or with the negotiation of any contracts or agreements relating to any employees of Tom Revels." Plaintiff then alleged that it had never consented to the presence of defendant's agents or officers on the private walkway nor invited or consented to the said pickets parking their automobiles in plaintiff's parking lot. Plaintiff further asserted that unless defendant is enjoined and restrained from trespassing upon plaintiff's property, from commencing, doing and performing all of the acts and things which have been alleged, defendant will continue trespassing upon said property.

On June 27, 1962, a trial court overruled defendant's demurrer and granted the preliminary injunction sought by plaintiff. In a written opinion the trial judge stated in pertinent part as follows: "Having determined that the area in question is, upon the record before this Court, the private property of plaintiff, and that the business defendants transact thereon is without the use for which plaintiff intended its parking areas and walkways, and in view of the foregoing authorities, the Court must, therefore, allow plaintiff the relief it seeks."

Defendant filed its answer to the second amended complaint on July 12, 1962. Among other things defendant denies that the walkway was built and maintained by plaintiff solely for the use of plaintiff's tenants and customers and suppliers of said tenants; denies that under the terms of the lease plaintiff is in exclusive possession and control of the walkway and parking lot, alleges that plaintiff impliedly invited the defendant upon the premises and asserts for a first affirmative defense that plaintiff is not a proper party plaintiff and is entitled to no relief.

A pre-trial conference order was filed October 23, 1962. It incorporated by reference a joint pre-trial statement of the parties. Therein the following matters of fact were agreed upon: (1) That plaintiff, a corporation, operates a shopping center known as Rolling Hills Plaza, which shopping center is located in the City of Torrance. (2) that plaintiff leases the shopping center from the City of Torrance under a lease which began on March 1, 1958, and will end on December 31, 2007. (3) that located in the shopping center are various stores which plaintiff subleases to tenants and that one such

tenant is Tom Revels who operates a bakery under the name of Revels' Bakery Shop, (4) that Tom Revels leases his shop under a lease which calls for rental payments to plaintiff in the amount of $450 per month plus 5 per cent of the monthly gross income from the bakery shop, (5) that also located in the shopping center in front of the various stores is a walkway and parking lot which was constructed by plaintiff, that the purpose of the walkway is to provide a means of ingress and egress to the various stores located in the shopping center, (6)that defendant caused pickets to be placed on the walkway in front of Revels' Bakery Shop, (7) that none of the employees of Revels' Bakery Shop belongs to or is a member of the defendant union, (8) that plaintiff through its attorneys demanded that defendant cause the pickets to be removed from plaintiff's premises on February 3, 1962. In addition to setting forth the matters of fact agreed upon the parties set forth their respective contentions.[1]

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[1]"CONTENTIONS OF THE PARTIES

"A. *Plaintiff's contentions:*

1. That plaintiff built, operates and maintains the parking lot and walkway solely for the use of its tenants and the customers and suppliers of said tenants.
2. That plaintiff is in exclusive possession and control of the said walkway and parking lot.
3. That defendant's picketing of one of plaintiff's tenants on the walkway and parking lot constitutes a trespass on plaintiff's private property.
4. That the defendant union, through its officers, agents and members, have done the things and acts described in paragraphs VI and VII of plaintiff's second amended complaint, and are not entitled to engage in and do such acts and things as described in said paragraphs.
5. That during the time as described in plaintiff's complaint when defendant union was picketing on plaintiff's property, monetary damage was caused to plaintiff by the loss of rentals under plaintiff's lease with its tenant, Tom Revels.
6. That plaintiff has not unlawfully discriminated against defendant union.

After a trial by the court, findings of fact and conclusions of law were filed on January 2, 1963.[2]

"B. *Defendant's contentions:*

1. That the shopping center involved in this case has been open to the public without restriction or limitation.
2. That plaintiff is not a proper party to bring this lawsuit.
3. That defendant Union's picketing does not constitute a trespass as to plaintiff or any other persons.
4. That defendant Union has not done the things or acts described in Paragraphs VI or VII of plaintiff's Second Amended Complaint.
5. That plaintiff is not in exclusive possession or control of the walkway or parking lot; or that the walkway and parking lot are maintained for the sole convenience of tenants, customers and suppliers of the shopping center.
6. That plaintiff impliedly invited defendant union and its pickets upon the premises.
7. That if plaintiff did not impliedly invite defendant union and its pickets upon the premises, plaintiff unlawfully discriminated against defendant union.
8. That defendant Union and its pickets have a legal and costitutional right to picket on the premises of the shopping center.
9. That the picketing involved has caused no damage to plaintiff.
10. That if defendant union has committed any actionable wrong, the remedy at law is adequate."

[2]"FINDINGS OF FACT

"I

"Plaintiff is now and has been at all times herein mentioned a corporation organized and existing under the laws of the State of California, and has its principal office and place of business in the City of Torrance, County of Los Angeles, State of California.

"II

"Plaintiff is and has been at all times herein mentioned the proper party to bring this action.

"III

"Defendant Bakery & Confectionery Workers Union, Local 31, is now and has been at all times herein mentioned an unincorporated voluntary association functioning as a labor organization and affiliated with the Bakery and Confectionery Workers' International Union of America.

"IV

"Plaintiff is now, and has been at all times mentioned herein, the lessee of a parcel of real property located on the corner of Highway 101 and Crenshaw Boulevard in the City of Torrance, County of Los Angeles, State of California. That plaintiff leases said property from the City of Torrance under a lease which

Judgment was entered January 3, 1963, and the within appeal followed.

There are essentially two issues presented in the case at bar. First, whether the owner of a shopping center, not a party to the disharmony attributable to labor and management, is entitled to enjoin as trespass a union's peaceful organizational picketing of commercial premises leased by an employer from the owner. The second, whether the state court has jurisdiction to entertain the action initiated by the shopping center owner.

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began on March 1, 1958 and ends on December 1, 2007, A.D. That plaintiff has built a shopping center on said parcel of property consisting of stores, parking lot, driveways and a walkway. That the purpose of said walkway is to provide a means of ingress and egress for the customers, both actual and potential, of the stores located in said shopping center. That the said parking lot and walkway was constructed and has, at all times, been maintained for the convenience of customers and prospective customers of the stores located in said shopping center. That plaintiff is now, and has been at all times, in exclusive possession and control of the parking lot and walkway in said shopping center.

"V

"That one of the stores located in said shopping center is leased and rented to Tom Revels, who owns and operates a bakery known as Revels Bakery Shop. That said Tom Revels pays to plaintiff as rent the sum of $450.00 per month, plus five percent of the gross income from the operation of said bakery shop.

"VI

"That beginning on the 16th day of February 1962, until the 9th day of March 1962, and beginning again on April 17, 1962 and continuing until on or about the 2nd day of July 1962, defendant union, through its officers and agents, trespassed upon plaintiff's private property and picketed the said Revels Bakery Shop for the purpose of advertising a labor dispute with plaintiff's tenant, Tom Revels, and for the further purpose of inducing the employees of Tom Revels to join defendant union. That in trespassing upon plaintiff's private property, defendants caused pickets to be placed in front of the said Revels Bakery Shop, on plaintiff's private walkway, and said pickets marched up and down in front of said bakery shop carrying signs which read: 'Revels Bakery is non-union and is unfair to organized labor. Please do ot patronize. Signed, Bakers Union Local 31.'

Turning first to the jurisdictional issue we believe that the approach taken in the concurring opinion in *Freeman v. Retail Clerks Union Local No. 1207* (Washington), 363 P.2d 803, at page 807, is sound. It is there stated in pertinent part as follows:

> ". . . the issue presented was whether the property owners, despite their precautions and efforts to protect their right to control the use of the property, had lost the right to prevent pickets from carrying their signs . . .

"VII

"That plaintiff, on or about the 23rd day of February 1962, demanded that the defendant remove its officers and agents from plaintiff's property and to cease defendant's trespassing. That plaintiff did not, at any time, invite defendant on plaintiff's private property or consent to defendant's presence thereon.

"VIII

"That defendants failed, neglected and refused to cease the above described picketing and trespassed on plaintiff's property on the walkway and parking area in front of the store leased to Tom Revels.

"CONCLUSIONS OF LAW

"1. That plaintiff has the exclusive right, possession and control of the parking lot and walkway located on plaintiff's property, and constructed and maintains said walkway and parking lot sole for the convenience of the customers, both actual and potential, of said shopping center.

"2. That defendants are not entitled to enter upon plaintiff's property for the purpose of picketing and advertising a labor dispute and that such entry and picketing constitutes a trespass against plaintiff.

"3. That defendants are entitled to picket and to advertise their labor dispute with said Tom Revels on the public sidewalks outside of plaintiff's property.

"4. Plaintiff is entitled to a permanent injunction against defendant union, its officers and agents, enjoining said union, its officers and agents from trespassing or entering upon plaintiff's shopping center or the purpose of picketing and advertising its labor dispute with plaintiff's tenant, Tom Revels.

"5. That this court has jurisdiction over the subject matter of this action.

"6. That plaintiff is entitled to recover its costs incurred herein.

"Let judgment be entered accordingly."

". . . *the appellants* [respondent in the case at bar] *are before the court as property owners who do not want certain people to do certain things on their property. They are not here as employers, or as individuals having any present or foreseeable future relationship with the picketing union.* Just how or on what theory the appellants [respondents in the case at bar] could get a hearing before the National Labor Relations Board (to determine whether pickets are justifiably on their property) is not clear to me.

"If instead of being a shopping center, the property in question was merely a forty-acre pasture for contented cows, but a desirable place from which pickets could carry signs imparting information . . . to the customers of that company, there could be no question that the owner would be entitled to an injunction—not to restrain the picketing, but to prevent their trespass on property where they had no right to be.

"Yet the logic of the pre-emption of jurisdiction, as applied by the majority, is that trespass means nothing. Given peaceful picketing and a concern engaged in interstate commerce, then the state courts are divested of jurisdiction over any controversy which might arise.

"*It should be noted that the question with which we are here concerned was expressly reserved in Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 427, A.F.L. v. Fairlawn Meat, Inc., 1957, 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed. 2d 613. Unless the court there believed it*

possible to frame an injunction and enforce an injunction aimed narrowly at a trespass, it did a vain and useless thing in making a remand to the state court.

"Until the Supreme Court of the United States holds that the law of trespass is no longer applicable to pickets under any circumstances, the state courts not only have the right, but the duty, to determine the extent to which pickets may utilize the property of nonparticipants in a labor dispute." (Emphasis added.) (See *Moreland Corp. v. Retail Store Employees Union No. 444* (1962), 16 Wis.2d 499 [144 N.W.2d 876]; *People v. Goduto*, 21 Ill.2d 605 [174 N.E.2d 385]. Cert. den. 30 L.W. 3180; but see 48 Virginia Law Review 133; 73 Harvard Law Review 1216, and 10 Stanford Law Review 694).

We determine that the state court has jurisdiction to entertain the present action. We now turn to the issue of whether the plaintiff shopping center owner under the circumstances is entitled to enjoin as a trespass defendant's peaceful organizational picketing.

As is set forth in footnote 2 the trial court found that plaintiff owner was in exclusive possession and control of the parking lot and walkway in the shopping center; that plaintiff did not at any time invite defendant on plaintiff's private property or consent to defendant's presence thereon and that defendant trespassed upon plaintiff's private property. These findings find evidentiary support in the record.

However, attaching the label of private property to the area involved is not in and of itself the answer to the question of whether plaintiff is entitled to an injunction.

Two competing social interests are brought into sharp conflict, namely, the conflict between property ... and freedom of speech.

The approach taken in the concurring opinion in the Washington case of *Freeman v. Retail Clerks Union Local No. 1207, supra,* 363 P.2d 803, is valid. In pertinent part it is there stated as follows:

> " 'A review of the authorities reveals that there are certain factual situations where virtually every court would say "No" to persons desiring to come upon privately-owned land for the purpose of exercising free speech. There are also situations where virtually every court would require an owner of private property to suffer an infringement of his right to control the property in favor of free speech. Research reveals there to be five factors which, if present, any court would be justified in weighing the equities of the parties and in considering the right of the union to come upon private property to engage in peaceful picketing.
>
> " 'Courts uniformly have considered tolerating what would otherwise be an unlawful trespass when a person or persons come upon private property for the purpose of exercising his or their right of free speech when all of some of the following factors are present:
>
> " '1. When the private property owner designs his property for use by the general public in such a manner as to make it difficult to impossible to distinguish its physical characteristics from publicly-owned property similarly so devoted;
>
> " '2. The exercise of the right of free speech is for the purpose of making a communication to

persons naturally upon the premises as a result of the inherent nature of the primary use to which the property is devoted;

" '3. A similar communication clearly would be permitted under identical circumstances had the property been public;

" '4. Interference with the owner's fundamental rights of privacy or personal use and occupacy is not involved as distinguished from control, and no direct pecuniary loss will result to the owner;

" '5. The trespasser has no place or means available as an alternate, or the only alternate would be unrealistic or impractical to the point where there exists a serious restriction upon the trespasser's ability to communicate as effectively as would naturally and normally be expected were the legal title in public ownership.

" 'Under such circumstances, the courts weigh the magnitude and character of the invasion of the property rights against the seriousness and nature of the restrictions upon the trespasser's freedom of speech.' "

Under the usual and generally accepted circumstances, a property owner can control as to who goes onto such property and can dictate for what purposes an entry may be made onto the property. We know however that a formal dedication to public use is not a prerequisite to or for many considerable limitations and restrictions of the right of control. We have seen where legislatures have imposed limitations upon an owner's right to exclude persons from his property or to refuse service to such persons on account of their race or creed

if the property is used as a place of public accommodation. The courts also in many instances have placed restrictions on the control which an owner may exercise over his property such as in the "company town" situations.

The pickets here without their signs were undoubtedly indistinguishable from the other members of the public who were in the shopping center.

The judgment is reversed and the cause is remanded to the trial court with directions to make a redetermination in the light of the principles set forth above, each party to bear its own costs on appeal.

Fourt, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

Opinion of the Superior Court for the County of Los Angeles.

Superior Court of the State of California, for the County of Los Angeles.

Schwartz-Torrance Investment Corporation, a corporation, Plaintiff, vs. Bakery and Confectionery Workers' Union, Local No. 31, an unincorporated voluntary association; Does One to Twenty, inclusive, as Though Each Consecutively Numbered Doe Were Herein Specifically Named, Defendants. No. 791,071.

Filed June 27, 1962.

Plaintiff brings this action "to enjoin trespassing and picketing activities on private property." It has likewise filed a motion to obtain preliminary injunction. Defendant Union has interposed a general demurrer. Both matters have come on regularly for hearing, and after argument have been submitted to this Court for ruling.

Plaintiff is the lessee of the real property and improvements described in its second amended complaint, which real property is located in Torrance, California. Plaintiff holds under a written "Agreement and Assignment of Lease" between and from Jefferson, Inc., a corporation, dated March 1, 1958 (Exhibit A) a land owner in the City of Torrance.

Under said agreement, Plaintiff has entered into possession and has erected a "Shopping Center." The buildings comprising the said Center abut upon a five-foot walkway, and the walkway gives upon a parking area so that customers may park their cars and pass directly to the walkway and to their destination. The walkway is likewise a means of ingress and egress from adjoining streets. Plaintiff pleads exclusive control, and

that the parking lot and walkways are for the sole convenience of its tenants and the latter's customers and suppliers. This contention is supported by affidavits, and Exhibit A does no violence to plaintiff's position.

Plaintiff has various tenants paying rentals to it upon a guarantee and percentage basis, including Revels Bakery which is presently being picketed by the defendants. Revels' employees are not union members and the picketing is concededly for organizational purposes. The pickets conduct their operations on the walkway in front of the Revels store, and carry banners and placards as described in plaintiff's said complaint.

Plaintiff has no dispute with defendant Union, and defendant is not attempting organization of any of its employees.

Plaintiff contends basically that the walkways and parking areas are its private property subject to its exclusive control, that it has no dispute with defendants and they are, therefore, trespassers on private property, its activities described being foreign to the use of the parking area and walkways intended and permitted by plaintiff. The affidavit of Mr. Abe Schwartz, an officer of plaintiff, shows that plaintiff at all times maintained a rigid control over the use of its premises, particularly requiring permission to be had first and obtained for any use other than that of customers and suppliers entering upon the property for the purpose of having business with the tenants. As lessee, plaintiff stands in the same position as land owner as to trespassers. (*Kellogg v. King*, 114 Cal. 378.)

Defendant, on the other hand, contends that the walkways and parking area are similar to public streets

and sidewalks, that plaintiff has permitted their use by the general public and, therefore, defendant in the exercise of his right of free speech, has a right to peaceful picketing on the premises.

In consideration of the issues stated, it is first necessary to consider the nature of a "Shopping Center". The modern "Shopping Center" has come into being in recent years by reason of the rapid growth of the country's large cities, with the resultant crowding in downtown shopping areas. A "Shopping Center" may be said to be but the suburban version of the multi-story downtown buildings devoted to merchandising through the medium of a number of merchants housed in a multi-story building. The business is conducted on private property which is not necessarily owned by the respective tenants, and the hallways, foyers, and aisles in the multi-story building find expression in the walkways of the suburban shopping center. Concededly, picketing would not be allowed, or possibly even thought of by the defendant, in the hallways, foyers, and aisles of the multi-story mercantile establishment, and it would seem there is no distinction between the respective means of entrance. The object in each case is similar. As said in *Spohrer v. Cohen*, 149 N.Y.S.2d 493, wherein the union entered upon a privately owned ranch market for picketing of a tenant of the owner:

> "Guarisco and Formichelli predicate their resistance to this motion squarely on the proposition that if they were on the premises to solicit employees of the merchants to join their union, the injunction did not bar their presence. This position is of very questionable validity. It is to be remembered that Guarisco and Formichelli were not seek-

ing to organize employees of the plaintiff. They point to no authority which sustains their right to enter upon plaintiff's premises and to there conduct organizational activity of employees of merchants who, in effect, rent space from the plaintiff. Indeed, authority points in the other direction. It has been held in the case of a department store that an employer may keep union organizers who are not employees out of the store and may restrict solicitation by union employees to areas not open to the public, Marshall Field & Co. v. National Labor Relations Board, 7 Cir., 200 F. 2d 375."

A street, in its usual and ordinary meaning, denotes a public highway. It does not include a private walkway. (*Loma Vista Investment, Inc. v. Roman Catholic Archbishop*, 158 Cal. App. 2d 58.) Sidewalks are but a part of the street devoted to pedestrian traffic. (*Nikell v. City of Buffalo*, 165 N. Y. 2d 592.)

Dedication for public use is not a trivial thing, and the intention of the owner to set apart land for public use must be unequivocably manifested, and proof of intention to dedicate to a particular public use does not support any implication of intention to dedicate to another and different public use. (*California Navigation & Imp. Co. v. Union Transp. Co.*, 126 Cal. 433; *Robas v. Allison*, 146 Cal. App.2d 716.)

As stated by Judge Files, while a Judge of this Court, in *Whitshaw v. Local 324*, No. 768,592: "Defendant claims its pickets are among the class invited to use the premises under the terms of the easement. It seems to

the court unreasonable and unrealistic to assume that the property owner actually intended to invite the use which defendant makes of the premises. * * *"

Defendants' business is with the public generally, that is, to advise them to discontinue patronizing Revels Bakery; a business not within any concept of the use for which plaintiff constructed and has permitted the walkway and parking area to be used, and is an invasion of the use intended by plaintiff.

A shopping center is not to be confused with a town, as in *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, any more than is any other building open to the customers of tenants. The *Marsh* case develops the proposition that the balancing of social interests in freedom of speech is a factor to be weighed by the trial court in each particular case. Such determination, therefore, is one of fact and a general demurrer raises no question of fact. (*Mackay v. Clark Rig Bldg. Co.*, 5 Cal. App. 2d 44; *Moreland v. Retail Clerks Union*, (Wisc. 1962, cited in 50 LRRM 2092).)

N.L.R.B. v. Babcock and Wilcox Co., 351 U. S. 105, and *Marshall Field & Co. v. N.L.R.B.*, 200 F. 2d 375, deal with organizational privileges on the employer's property. In the latter case at page 380 of the decision, the court held Holden Court to be in the nature of a public street even though owned by the Company; again a determination of facts and one that therefore lacks impact at this stage of these proceedings.

No cases have been cited by defendants where relief has been denied the owner of property under its sole dominion and control upon the facts as here alleged. Defendants cite *Moreland v. Retail Clerks Union, supra,* in support of such contention. In the *Moreland* case, plaintiff operated a shopping center and one of his tenants was picketed by using plaintiff's privately owned sidewalk. The union demurred to plaintiff's complaint, which demurrer was overruled. It then answered and moved for summary judgment, which was denied and an appeal taken. The Supreme Court held there was material facts and issues which necessitated a trial weighing the parties conflicting interests of private property and of free speech, and denied the appeal. This holding is particularly persuasive in consideration of the instant case.

There appears an actionable difference between a proceeding brought by tenants to restrain picketing for organizational purposes and one brought by the land owner having no dispute with the union. (*Nahas v. Local 905, Retail Clerks Association*, 144 Cal. App. 2d 808.) By inference from, and the logical development of the language used in the decision points unerringly to the support of this proposition.

Defendants' status could not be affected because of their belief that the property in question was public whereas, in fact, it was private. (*Palmquist v. Mercer*, 43 Cal. 2d 92.)

Having determined that the area in question is, upon the record before this Court, the private property of plaintiff, and that the business defendants transact thereon is without the use for which plaintiff intended its parking areas and walkways, and in view of the foregoing authorities, the Court must, therefore, allow plaintiff the relief it seeks.

Defendants' demurrer is overruled; defendant to have ten days to answer.

Preliminary injunction to issue as requested upon an undertaking in the amount of $1,000.

Plaintiff's attorney to prepare formal order.

Dated: June 27, 1962.

James M. McRoberts
Judge of the Superior Court